88-1701

Supreme Court, U.S.
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NO.

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

CLAUDE R. WILSON, JR., and
MODES, INC.

Petitioners

v.

UNITED STATES OF AMERICA and
ROBERT W. WALLACE

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

CLAUDE R. WILSON, JR.*
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QUESTIONS PRESENTED FOR REVIEW

Issue 1

Can the United States Customs Service lawfully seize documents that constitute attorney work product pertaining to an ongoing Customs Service criminal investigation where those documents were contained in a briefcase searched by a Customs agent upon the attorney and his investigator returning from out of the country?

Issue 2

Where the Customs Service deliberately planned the illegal seizure of the legal files, can the seizure constitute a denial of the Sixth Amendment right to counsel?

Issue 3

Did the District Court err in ordering the Customs summonses enforced after Customs committed such egregious violation of Constitutional rights?

Issue 4

Did the District Court err in summarily denying Petitioners the opportunity to conduct any discovery inquiring into the illegal search?

LIST OF ALL PARTIES

The caption of this proceeding contains the names of all parties.

NO.

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OPINIONS BELOW

The Fifth Circuit Opinion appears at *United States v. Wilson*, 864 F.2d 1219 (5th Cir. 1989). (See Appendix)

JURISDICTION

Both the opinion and the judgment of the Fifth Circuit Court of Appeals were dated February 8, 1989. The date of the order denying the petition for rehearing was March 7, 1989. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1254(1) to review this proceeding by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to assistance of counsel provided by the Sixth Amendment to the Constitution as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves the authority granted to Customs under 19 U.S.C. Sec. 482 to conduct a search for merchandise that is subject to duty or illegally imported:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or other wise, he shall seize and secure the same for trial.

The case also involves judicial enforcement of administrative summonses pursuant to 19 U.S.C. Sec. 1510, which provides as follows:

> (a) Order of Court. — If any person summoned under section 1509 of this title does not comply with the summons, the district court of the United States for any district in which such person is found or resides or is doing business, upon application and after notice to any such person and hearing, shall have jurisdiction to issue an order requiring such person to comply with the summons. Failure to obey such order of the court may be punished by such court as a contempt thereof.
>
> (b) Sanctions. — (1) For so long as any person, after being judged guilty of contempt for neglecting or refusing to obey a lawful summons issued under section 1509 of this title and for refusing to obey the order of the court, remains in contempt, the Secretary may —
>
> (A) prohibit that person from importing merchandise into the customs territory of the United States directly or indirectly or for his account, and
>
> (B) instruct the appropriate customs officers to withhold delivery of merchandise imported directly or indirectly by that person or for his account.
>
> (2) If any person remains in contempt for more than one year after the date on which the Secretary issues instructions under paragraph (1)(B) with respect to that person, the appropriate customs officers shall cause all merchandise held in customs custody pursuant to such instructions to be sold at public auction or otherwise disposed of under the customs laws.
>
> (3) The sanctions which may be imposed under paragraphs (1) and (2) are in addition to any punishment which may be imposed by the court for contempt.

STATEMENT OF THE CASE

This case arose in United States District Court as a petition to enforce compliance with administrative summonses under 19 U.S.C. Sec. 1510. This statute was the basis for federal jurisdiction in the court of first instance, pursuant to 28 U.S.C. Section 1331, which gives district courts of the United States original jurisdiction of civil actions arising under the Constitution, laws, or treaties of the United States.

In April, 1985 the United States Customs Service served administrative summonses upon Modes, Inc. ("Modes") and Modes' attorney, Mr. Claude R. Wilson, Jr., who formerly worked for the government himself as Senior Trial Attorney, I.R.S., Chief Counsel's Office. Thereupon Wilson, accompanied by his investigator, Mr. Tim Millis, formerly with the government as Chief of Criminal Investigation Division, Dallas, I.R.S., met with Customs officials and informed them that they intended to travel to Taiwan to obtain information related to the Customs investigations. In order to allow completion of the trip, Petitioners were given an extension of time to comply with the summonses. However, when Wilson and Millis returned from their trip, while passing through Customs at Dallas Fort Worth International Airport, a Customs agent searched for the Modes legal file and seized it. The officials at the scene thereupon refused to return the Modes legal file despite the protests of Millis and Wilson that the papers seized were attorney work product protected by the attorney/client privilege.

Only written materials were involved. There was no suggestion of any contraband. The suitcases were ignored. The other files in the briefcases were ignored. From the circumstances it was clear that the Customs agent had been informed that Wilson and Millis would be returning from

out of the country. It was also clear that the Customs agent was on the lookout for the Modes legal file. Customs held the documents for several days after the seizure.

Customs did not recognize the wrongfulness of this seizure of attorney work product. Customs believes that the seizure is supported by law. (See appendix, letter dated September 30, 1984, from Deputy Commissioner, U.S. Customs Service.) Not only did Customs commit a reprehensible act, but they believe they were justified in doing so.

Subsequent to this incident, Customs issued and served further summonses on Petitioners. Petitioners inquired into the airport incident, but answers were not forthcoming from the government officials involved. Petitioners appeared pursuant to the summonses, but refused to produce documents. Customs filed a petition to enforce the summonses, thus initiating the proceeding at bar.

After this proceeding commenced, Petitioners sought opportunity to conduct discovery in order to learn who was involved in planning the illegal seizure, what their purposes were in pursuing this means of obtaining information rather than waiting for compliance with the summonses, and how they used the illegally-obtained information. The District Court summarily denied Petitioners the opportunity for discovery.

The District Court referred the case to a magistrate for hearing. At the hearing, the only witness whom Petitioners were allowed to cross-examine was the agent in charge of the investigation, and the scope of even this cross-examination was severely limited by the magistrate. Upon review of the magistrate's findings, the District Court determined that the summonses should be enforced. The Petitioners never learned the answers to their questions concerning the seizure.

On appeal, the Court of Appeals for the Fifth Circuit has ordered remand of the case since the District Court failed to conduct a *de novo* review of the findings of the magistrate. However, the Court of Appeals denied Petitioners' request for further discovery on remand.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Although the Fifth Circuit found it appropriate to admonish Customs in the final Paragraph of the opinion for "outrageous and reprehensible behavior", and trusted that its warning would suffice to deter future similar conduct, Customs does not recognize the wrongfulness inherent in the constitutional violations. In a letter dated September 30, 1984 (See appendix), Alfred R. DeAngelus, Deputy Commissioner, U.S. Customs Service, wrote to Mr. Duncan Boeckman, a member of the law firm representing Petitioners in this case, reporting that "the employees' actions are upheld by numerous court case precedents." Furthermore: "the Customs employees acted in accordance with current and appropriate guidelines." As evidenced by this letter, Customs fails to recognize the abuse that is inherent in using the authority to conduct a search for contraband as an excuse to justify a search and seizure of the confidential legal file of an attorney relating to a target of an ongoing criminal investigation.

If Customs believes that they can seize an attorney's files, then the wrong will occur again and again. The Customs agents did not err of their own accord. Rather, they acted in accordance with the guidelines established for their office. The circumstances of this case certainly call for refusal to order enforcement of the summonses in question in order to show the Customs Service that the duty to search for

contraband does not justify the violation of clear constitutional rights.

Furthermore, the District Court did not even permit discovery concerning the seizure. If the government can create an intended violation of constitutional rights and then, by asserting that no unfair advantage was gained thereby, avoid even being required to disclose the circumstances behind the violation, then the impact on the constitutional rights is devastating. If the citizen is not permitted discovery to prove the violation and the harm that resulted, then the citizen's ability to redress the wrong is necessarily crippled. The deterrent impact on a government agent who is of a mind to hide or even minimize the nature of what occurred, will disappear.

The decision at bar conflicts with other Court of Appeals decisions. For instance, in *United States v. Levy*, 577 F.2d 200 (3rd Cir. 1978), *no cert.*, the court held that where there is a knowing violation of the attorney/client relationship which results in the disclosure to the government of confidential information, overwhelming considerations militate against a standard which tests the Sixth Amendment violation by weighing the degree to which the disclosure was prejudicial to the defense.

In *United States v. Irwin*, 612 F.2d 1182 (9th cir. 1980), *no cert.*, the court adopted a different standard from *Levy*, and held that the right to counsel is only violated by government intrusion when the intrusion "substantially prejudices" the defendant. The court stated that under this standard, if the defendant raises a material issue of fact which would entitle the defendant to relief, then an evidentiary hearing is required.

In *United States v. King*, 724 F.2d 253 (1st Cir. 1984), *no cert.*, the Defendant alleged that undercover agents planted

listening devices to pick up conversations between the Defendant and the Defendant's attorney. The court stated "But where some evidence (if believed) points to the commission of serious acts of misconduct, we are reluctant to affirm without a full investigation of that misconduct." (p.258)

The sole witness whom Petitioners were allowed to examine concerning the violation of their constitutional rights was the agent who was responsible for the investigation, and who clearly had an interest in minimizing the apparent impact of the violations. Corroboration of the testimony of this witness was impossible due to the limitations on discovery imposed by the court. The court did not allow Petitioners to question him regarding with whom else he talked on the night of the incident in question, other than one officer at the airport. In addition, the Petitioners were not allowed to learn the identity of the person in whose presence the envelopes containing the privileged documents were opened by the witness. The court would not even allow the Petitioners to find out who else might have looked at the documents. The witness said that he could not remember who else had custody of the seized materials. Accordingly the questions of who planned the illegal search, what their purposes were, and what use of the documents was made by the government were not answered.

This writ should be granted and decision rendered for the Petitioners to show that callous disregard for constitutional rights, as well as the deliberate, heavy-handed type of tactics demonstrated by this case will not be passively tolerated by the courts. The District Court should have allowed full investigation of the wrongdoing, and then ordered appropriate relief to deter further violations in the future. An old maxim holds that courts of equity will not grant relief to a

party with unclean hands. When Customs comes before a court with unclean hands, dirtied by intentional violation of fundamental civil rights, the court should refuse to allow its process to be used to further the intrusion that has occurred. The circumstances of this case certainly call for such a refusal.

CONTENTS OF APPENDIX

Attached hereto are the following:

(1) Letter dated September 30, 1984, from Alfred R. DeAngelus, Deputy Commissioner, U.S. Customs Service, to Duncan Boeckman, counsel for Petitioners.

(2) Opinion below in *United States v. Wilson*, 864 F.2d 1219 (5th Cir. 1989).

(3) Judgment dated February 8, 1989, by the Court of Appeals for the Fifth Circuit.

(4) Denial of rehearing by the Court of Appeals for the Fifth Circuit.

(5) Order filed February 19, 1988, in the United States District Court for the Northern District of Texas, Dallas Division.

(6) Magistrate's Findings and Recommendations filed January 14, 1988.

PRAYER

For the reasons stated, Petitioners pray that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,
GOLDEN, POTTS, BOECKMAN
& WILSON
NCNB Center
Tower II - Suite 2300
Dallas, TX 75201-3802
(214) 742-8422

By:_____
Claude R. Wilson, Jr.

By:_____
William S. Lee

ATTORNEYS FOR
PETITIONERS

CERTIFICATE OF SERVICE

I, William S. Lee, hereby certify that on this _____ day of April, 1989, I served the foregoing Petition for Writ of Certiorari by mailing by certified mail, postage prepaid, three copies each of said document to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Chris Luke
Office of Regional Counsel
U.S. Customs Service
5050 San Felipe, Suite 550
Houston, TX 77057

Marvin Collins
United States Attorney
1100 Commerce Street, Room 16G28
Dallas, TX 75242

_____
William S. Lee

RECEIVED
OCT 3, 1985
Golden Potts
Beckman & Wilson
REFER TO
SEC 6-14 IA:S:I

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON

September 30, 1985

Dear Mr. Boeckman:

In response to your letter of May 23, 1985, regarding the incident at Dallas-Fort Worth Airport, involving the detention of your documents and the conduct of several employees of the U.S. Customs Service, I contacted Internal Affairs who initiated an investigation of the incident.

After reviewing the memorandum of events from Claude R. Wilson, Jr. and the report of investigation, affidavits, and other attachments, it appears the Customs employees acted in accordance with current and appropriate guidelines.

The letter from Mr. Wilson stated that the documents were taken to a "private office" where he felt they were read and copied. The investigation disclosed that the documents were in the next room in full view of Mr. Wilson and Mr. Millis and, if the documents had been read or copied, both gentlemen could have easily observed both actions through the open blinds. Mr. Wilson also stated that he was detained in custody for 1 hour and 5 minutes. The records of the flight's arrival show the first passenger was processed at 6:42 p.m. Mr. Wilson received the reciept for his detained paperwork and was released at 7:30 p.m. The time of examination was only 48 minutes, which is more than reasonable considering all of the guidance and advice the inspectors had to receive from higher authority.

The Customs employees in question were guided by the counsel of an Assistant U.S. Attorney at all times and the employees' actions are upheld by numerous court case precedents.

The inspection process at all international ports of entry is an important law enforcement function and properly utilized will protect this country from many dangerous elements. This process must be performed thoroughly and professionally. At times travelers are inconvenienced, but hopefully this examination process will always be handled with the utmost speed and professionalism on the part of all Custom employees.

After careful review of the report of investigation, I believe that all Customs employees involved with this incident acted in a very professional manner in their duty to enforce the Customs laws of the United States.

Please let me know if I can be of further assistance in this matter.

Yours faithfully,

Alfred R. De Angelus
Deputy Commissioner

Duncan Boeckman, Esq.
Golden, Potts, Boeckman
and Wilson
2300 Republic Bank Tower
Dallas, Texas 75201

UNITED STATES of America and Robert W. Wallace, Plaintiffs-Appellees,

v.

Claude R. WILSON, Jr., and Modes, Inc. Defendants-Appellants.

No. 88-1157

United States Court of Appeals,
Fifth Circuit.

Feb. 8, 1989.

The Government filed petition to enforce administrative summonses, which sought production of records required to be kept by importer in order to ensure compliance with Customs laws. After hearing, magistrate issued findings and recommendations, concluding that summonses should be enforced. The United States District Court for the Northern District of Texas, Robert W. Porter, Chief Judge, entered order adopting the magistrate's findings and recommendations. Appeal was taken. The Court of Appeals held that: (1) remand was required for de novo review; (2) importer could not establish abuse-of-process defense based on seizure of documents at Customs' checkpoint; and (3) denial of further discovery was not abuse of discretion.

Remanded.

1. United States Magistrates — 27

District court must engage in de novo review where party has objected to magistrate's decision. 28 U.S.C.A. § 636(b)(1); Fed.Rules Civ.Proc.Rule 72(b), 28 U.S.C.A.

2. Federal Courts — 922

District judge, who announced that he was applying the "clearly erroneous, abuse of discretion and contrary to law" standard review to magistrate's decision, did not give sufficient indication that he made his own determination based

upon the record and unrestrained by findings and conclusions of the magistrate; therefore, remand was required for de novo review, in proceeding on petition to enforce administrative summonses which sought production of records required to be kept in order to ensure compliance with Customs laws, where objections were made to the magistrate's findings and recommendations. 28 U.S.C.A. § 636(b)(1); Fed.Rules Civ.Proc. Rule 72(b), 28 U.S.C.A.; Tariff Act of 1930, §§ 508, 509(b), 19 U.S.C.A. §§ 1508, 1509(b).

3. Administrative Law and Procedure — 464
Customs Duties — 54

In order to enforce administrative subpoena in customs context, the Government must establish four elements: there must be legitimate purpose of the investigation; specific inquiry must be relevant to that purpose; information sought must not already be in the Government's possession; and all internal administrative procedures must have been followed. Tariff Act of 1930, §§ 509(b), 510, 19 U.S.C.A. §§ 1509(b), 1510.

4. Administrative Law and Procedure — 464
Customs Duties — 54

Once the Government meets its burden on each of the four elements required for enforcement of administrative summons in customs context, burden shifts to defendant to challenge summons on any appropriate ground — e.g., to show that enforcement would represent abuse of the summons process. Tariff Act of 1930, §§ 509(b), 510, 19 U.S.C.A. §§ 1509(b), 1510.

5. Administrative Law and Procedure — 464
Customs Duties — 54

Case-by-case, totality-of-the-circumstances test is appropriate, including consideration of Government's good faith and harm caused by any unlawful conduct, when determining whether improper conduct of administrative

investigation constitutes abuse of process so as to bar enforcement of administrative summons. Tariff Act of 1930, §§ 509(b), 510, 19 U.S.C.A. §§ 1509(b), 1510.

6. Administrative Law and Procedure — 464
Customs Duties — 54

Irrespective of how distasteful events at airport may have been when Customs' agent seized legal files, which were being carried by investigator employed by importer's attorney and which pertained to Customs' investigation of importer, importer could not establish abuse-of-process defense to administrative summonses, which sought production of records required to be kept in order to ensure compliance with the Customs laws; at time of seizure, there were two outstanding subpoenas which apparently covered the seized documents, and new subpoenas, which were issued after the seizure and which also covered the documents, were almost identical to the first subpoenas, and thus, importer could not establish that subpoenas were result of the allegedly improper access arising from the seizure. Tariff Act of 1930, §§ 508, 509(b), 19 U.S.C.A. §§ 1508, 1509(b).

7. Federal Civil Procedure — 1271

District court did not abuse its discretion by denying further discovery on issue concerning whether Customs had possession of information in documents through having photocopied or read them during improper seizure, in proceeding on petition to enforce administrative summonses which sought production of records required to be kept by importer in order to ensure compliance with Customs laws. Tariff Act of 1930, §§ 509(b), 510, 19 U.S.C.A. §§ 1509(b), 1510.

Appeal from the United States District Court for the Northern District of Texas.

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

I. *Factual and Procedural Background.*

The defendants-appellants in this case are Modes, Inc. ("Modes"), a business engaged in importing jewelry from abroad, and Claude R. Wilson, Jr., its attorney. Modes and Wilson had been served with administrative summonses, pursuant to 19 U.S.C. § 1509(b), by appellee Robert W. Wallace, a Senior Special Agent with the United States Customs Service ("Customs"). Wallace sought production of certain records required to be kept by Modes under 19 U.S.C. § 1508, in order to ensure compliance with the Customs laws. The records were needed for a proper determination of the possible civil and criminal liability of Modes. Appellants obtained an extension of time to comply with the summonses so that Wilson and Tim Millis, his investigator, could travel to the Far East to secure evidence from business associates.

Upon returning from abroad to Dallas/Fort Worth International Airport, Millis was carrying in his briefcase Wilson's legal files pertaining to Custom's investigation of Modes. When Millis passed through Custom's checkpoint, an agent searched the briefcase containing the files and took them, refusing to return them to Millis or Wilson despite their protests. No reason was given for the seizure. The files were returned by Customs two days later, but because Millis had not been allowed to make an inventory prior to their being taken, he was unable to determine whether any of the documents had been removed and of course had no way of knowing whether thay had been photocopied.

Subsequently, Wallace issued and served two new summonses on Modes and Wilson, identical to the first two except that the time period for the records sought differed somewhat, i.e., 10/82 — 1/85 rather than 1/83 — 1/85. Appellants met with Wallace as required by the later summonses but, based upon the attorney-client privilege and the fifth amendment right against self-incrimination, refused to produce documents.

Wallace and the government filed in district court a petition to enforce the summonses, pursuant to 19 U.S.C. § 1510. That court, pursuant to 28 U.S.C. § 636(b)(1), referred the petition to a magistrate "for disposition." After a hearing, the magistrate issued findings and recommendations, concluding that the summonses should be enforced. The district court entered an order adopting the magistrate's findings and recommendations after considering Modes and Wilson's objections. That order was stayed pending this appeal.

II. *Standard of Review Applied by District Court.*

[1] Under the plain language of 28 U.S.C. § 636(b)(1), Fed.R.Civ.P. 72(b), and all of the relevant cases, a district court must engage in *de novo* review where a party has objected to a magistrate's decision. However, the district judge in this case announced that he was applying the "clearly erroneous, abuse of discretion and contrary to law" standard of review, which is appropriate only where there has been no objection to the magistrate's ruling. The only dispute is whether the district judge actually engaged in *de novo* review despite announcing an improper standard. If he did not, we must remand.

[2] The government cites authorities to the effect that a court may be found to have reviewed a magistrate's decision *de novo* even if it uses pro forma language indicative of a different standard. "[I]n providing for a '*de novo* determination,' rather than *de novo* hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." *United States V. Raddatz*, 447 U.S. 667, 676, 100 S.Ct. 2406, 2412, 65 L.Ed.2d 424 (1980). *Accord, Aluminum Co. of Am. v. E.P.A.*, 663 F.2d 499, 502 (4th Cir.1981) (use of "clearly erroneous" in district court's opinion does not preclude possibility that *de novo* review occurred).

The government's reliance upon these cases is misplaced. *Raddatz's* distinction between a *de novo* hearing and *de novo* review does not really help the government, as Modes does

not argue that a hearing should have occurred but only that the district court obviously did not engage in *de novo* review. Furthermore, the language concerning the "clearly erroneous" term in *Aluminum Co.* is dictum: The Fourth Circuit proceeded to find that *de novo* review had not occurred in that case, even though the district court patently had engaged in more extensive review than occurred here. Thus, that court, althouth de-emphasizing the significance of labels, ultimately held that "the district judge did not clearly indicate that he afforded the parties a *de novo* determination. In order to satisfy the Act, he must do so." *Id.* at 502.

Even if we were to adopt *Aluminum Co.* and fashion its dictum into a test for determining whether *de novo* review has occurred, the judge in this case still has not given sufficient indication that he made his own determination based upon the record and unrestrained by the findings and conclusions of the magistrate. The few passages from the district court's order cited by the government as revealing *de novo* review are inadequate. We therefore remand and instruct the district court to review the magistrate's ruling on the subpoena *de novo.* Moreover, because of the apparent confusion revealed in the record, we think it appropriate to outline briefly the law that should be applied on remand.

III. *Government's Burden in Getting Subpoena: Abuse of Process.*

[3] The general test for enforcement of an administrative subpoena is enunciated in *United States v. Powell,* 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964), involving an IRS investigation. This test applies in the customs context as well. *United States v. Frowein,* 727 F.2d 227, 230 (2d Cir.1984) (acquiescing in a district court's application of *Powell* to a customs case). Under *Powell,* the government must establish four elements: (1) There must be a legitimate purpose of the investigation; (2) the specific inquiry must be relevant to that pupose; (3) the information sought must not already be in the government's possession; and (4) all internal administrative procedures must have been followed. 379 U.S. at 57-58, 85 S.Ct. at 254-255.

[4] Once the government has met its burden on each of the four elements, the burden shifts to the defendent to challenge the summons on any appropriate ground — here, to show that enforcement would represent an abuse of the summons process. *See United States v. Barrett*, 837 F.2d 1341, 1344-45 (5th Cir.1988) (en banc). Therefore, on remand a defendant must establish abuse of process as a defense to enforcement if Customs meets its burden on the other four elements.

The thrust of Modes's argument that an abuse of process occurred is that the airport seizure of the documents was an illegal search and seizure, in violation of the fourth amendment, that enabled the government to make wrongful discoveries. Modes asserts that Customs officials, realizing that they could not lawfully retain the documents and use them against Modes, returned them and then pursued the subsequent procedure of obtaining a discovery subpoena, knowing then what the documents contained. Modes also contends that this process denied it the opportunity to raise effectively its attorney-client, work-product, and self-incrimination challenges to the discovery.

[5] In *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310 (5th Cir. Unit B May 1981), we established the principle that the improper conduct of an administrative investigation may constitute an abuse of process so as to bar enforcement of a subpoena. That case involved an SEC investigation in which that agency had tricked a company into disclosing information to it through friendly overtures and failure to disclose a pending formal investigation. We held ". . . that fraud, deceit, or trickery is grounds for denying enforcement of an adminstrative subpoena . . ." *Id.* at 317. At the same time, we cautioned that "the court should not invoke an automatic exclusionary rule." *Id.* Rather, a case-by-case, totality-of-the-circumstances test is appropriate, including consideration of the government's good faith and the harm caused by any unlawful conduct. *Id.* (citing *United States v. Bank of Moulton*, 614 F.2d 1063, 1065 (5th Cir. 1980)).

[6] A plaintiff must establish affirmative answers to three questions in order to have subpoena denied based upon abuse of process in a circumstance involving deceit. *First,* did the government act intentionally or knowingly? *Second,* was the defendant misled? *Third,* did the subpoena result from information obtained through the improper access to defendant's records? *Id.* at 317-18.

The *ESM* test requires some modification in order to make sense in the context of the instant case. Here there is obviously no trickery involved: The documents were seized outright, based upon Customs's being in a position of power at a point of entry. However, if Modes can show that the government acted without authority and in bad faith, its claim for abuse of process is even stronger than that in *ESM,* since the individuals here did not need to be misled but instead were *forced* to divulge the documents. Thus, the first two elements of the *ESM* test, as refashioned to meet these circumstances, require a showing that Customs lacked the authority to seize the documents and acted in bad faith in doing so.

The third element is more problematic. At the time of the search and seizure, there were two outstanding subpoenas that apparently covered the seized documents. New subpoenas, which also covered these papers and were identical except for the shorter time period covered, were issued shortly after the seizure. Hence, Modes cannot establish that the "subpoenas are the result of the . . . allegedly improper access . . ." *ESM, id.* at 318. The description of the documents was fashioned prior to the incident at the airport, as was Customs's effort to obtain the documents. Under these circumstances, and irrespective of how distasteful the events at the airport may have been, Modes cannot establish an abuse-of-process defense under ESM.

In its *de novo* review, therefore, the district court should first determine whether Customs has carried its burden on all four elements of the *Powell* test. If this burden is met, the subpoenas may be enforced. We leave it entirely in the hands of the district court to make the requisite findings and intimate no view as to them.

IV. *Denial of Discovery.*

[7] If Modes could prove that Customs has possession of the information in the documents through having photocopied or read them, the third element of the government's argument for the enforcement under *Powell* would be rebutted. Modes claims that the denial of discovery relating to this issue prevented it from being able fully to make its case and therefore constituted an abuse of discretion. Specifically, Modes asserts that the district court relied totally upon Wallace's testimony although other agents were involved in the investigation and had access to the seized documents; broader inquiry was prevented because discovery was denied.

This argument fails. Whatever the power of a district court to order discovery in connection with enforcement actions (a matter not now before us), the denial of discovery here does not constiute an abuse of discretion. It is not all clear that the intended discovery was so important that its denial was egregious. In fact, Modes makes much of such mundane matters as the court's quashing its request to depose Wallace in favor of relying upon his incourt testimony. No abuse of discretion occurred.

V. *Conclusion.*

The case is REMANDED to the district court for *de novo* review in accordance with the above-outlined legal principles. The denial of further discovery is AFFIRMED, although of course on remand the district court is free to make whatever further discovery rulings it deems appropriate.

In closing, although we do not finally resolve the dispute in question, we think it appropriate, whatever the outcome upon remand, to admonish Customs for what can only be described as outrageous and reprehensible behavior on the occasion in question. We trust that our warning today will suffice to deter any future similar conduct.

U.S. COURT OF APPEALS
FILED
FEB. 8, 1989
GILBERT F. GANUCHEAU
CLERK

For the Fifth Circuit

No. 88-1157

D.C. Docket No. CA3-85-2166-F

UNITED STATES OF AMERICA and ROBERT W. WALLACE,
Plaintiffs-Appellees,

v.

CLAUDE R. WILSON, JR. and MODES, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

Before REAVLEY, HIGGINBOTHAM, and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is affirmed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendants-appellants the costs on appeal, to be taxed by the Clerk of this Court.

February 9, 1989

ISSUE AS MANDATE:

U.S. COURT OF APPEALS
FILED
MARCH 7, 1989
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1157

UNITED STATES OF AMERICA and
ROBERT W. WALLACE,
Plaintiffs-Appellees,

v.

CLAUDE R. WILSON, JR. and MODES, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING
(March 7, 1989)

Before REAVLEY, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Entered for the Court:

_____
United States Circuit Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
FEB. 19, 1989
NANCY HALL DOHERTY, CLERK
BY _____ Deputy

ENTERED ON DOCKET 2-22-88
PURSUANT TO F.R.C.P. RULES
58 AND 79a.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

No. CA3-85-2166-F

UNITED STATES OF AMERICA and ROBERT W. WALLACE,

v.

CLAUDE R. WILSON, JR. and MODES, INC.,

ORDER

Before the Court comes Respondents' objections to the magistrate's findings and recommendations concerning a petition to enforce a United States Customs Service Summons.

I. Facts.

Respondents object to finding 9, a portion of finding 11, the penultimate sentence in the Magistrate's report, and the Magistrate's recommendation that the summonses served upon the Respondents be obeyed in each and every requirement thereof subject to any proper claim of the attorney-client privilege.

Finding 9 reads:

> The Customs Service investigation has not been referred to the Department of Justice for criminal prosecution, and there is no institutional commitment on the part of the Customs Service to proceed criminally with respect to either or both Respondents. (Hearing Transcript, page 12).

Finding 11 reads in part:

> The airport incident in May 1985 has no bearing on the lawfulness of the investigation at hand or on the summonses at issue. (Hearing Transcript, pages 39-40, 43-45, 84).

The penultimate sentence in the report reads:

> Any future invocation of the attorney-client privilege must be made on a document-by-document basis, specified in sufficient detail for the benefit of Government counsel and the Court, with the proviso that the attorney-client privilege does not apply to any business documents that are summoned here.

II. Standard of Review.

Miscellaneous Order No. 6, Rule 4(b)(2) provides that "No ruling of a magistrate in any matter which he is empowered to hear and determine shall be reversed, vacated or modified on appeal unless the district judge shall determine that the findings of the magistrate are *clearly erroneous,* or that the magistrate's ruling is *contrary to law* or constitutes *an abuse of discretion.*"

"Clearly erroneous" means that although there may be evidence to support the magistrate's ruling, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *See Golf City, Inc. v. Wilson Sporting Goods Co., Inc.,* 555 F.2d 426, 434 (5th Cir. 1977).

III. Analysis and Decision.

A. Finding 9.

The Court rejects Respondents' objection to Finding 9. The Court does not find that the Magistrate's finding was clearly erroneous, or that the magistrate's ruling is contrary to law or constitutes an abuse of discretion. *See* Petition to Enforce Summons ¶ 4, in which Wallace represented that was conducting an investigation to ascertain the correctness of entries for goods coming into the customs territory of the United States.

B. Finding 11, Penultimate Sentence, and Magistrate's Recommendation.

The Court rejects Respondents' objection to Finding 11, the penultimate sentence of the report, and the Magistrate's recommendation. Respondents have not carried their burden to show that the Magistrate's finding was clearly erroneous, or that the magistrate's ruling is contrary to law or constitutes an abuse of discretion. Most of Respondents' arguments consist of conclusory remarks that they are entitled to relief.

Respondents did, however, cite *United States v. Fortna*, 796 F.2d 724 (5th Cir. 1986), which concerned a criminal conviction for cocaine smuggling. This case is irrelevant for two reasons. First, a criminal prosecution was already in effect in *Fortna* when the subpoena was issued, and second, an individual rather than a corporation asserted his Fifth Amendment right in that case.

Likewise, Respondents have failed to show why *United States v. Doe*, 465 U.S. 605 (1984) is applicable. Respondents have failed to show why the production of the documents that Modes, Inc. conveyed to Wilson would result in testimony by conduct or in violation of the attorney-client privilege.

The Magistrate's report and recommendation is hereby adopted.

So ORDERED this 19th day of February, 1988.

ROBERT W. PORTER

ROBERT W. PORTER
UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JAN. 14, 1989
NANCY HALL DOHERTY, CLERK
BY _____ Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL No. CA3-85-2166-F

UNITED STATES OF AMERICA and ROBERT W. WALLACE,

v.

CLAUDE R. WILSON, JR. and MODES, INC.,

MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

Pursuant to an order of reference by the District Court, the Petition to Enforce United States Customs Service Summonses in this action was referred to the undersigned United States Magistrate for disposition. I interpret the order, however, as referring this case to me to make proposed findings of fact and a proposed disposition since the parties have not formally consented to trial before a magistrate. The Magistrate accordingly makes the following findings of fact and recommended disposition as evidenced by his signature hereto:

> An evidentiary hearing was conducted by the Magistrate, and Special Agent Robert W. Wallace, a Petitioner herein, as well as Tim Millis and Jaikishan Budhrani, testified. This Court also received a number of exhibits offered and admitted in the evidentiary proceeding.

The United States Magistrate makes the following findings of fact:

> 1. Modes, Inc. is a corporation that mainly imports costume and semi-precious jewelry from Taiwan. (Hearing Transcript, pages 3, 73-77).

2. The Customs Service is currently undertaking an investigation to determine whether Modes, Inc. is involved in a double-invoicing scheme in which false invoices may have been submitted to the Customs Service by or on behalf of Modes, Inc. The Customs Service is also investigating the true country of origin of the goods Modes, Inc. imports to determine whether they are subject to duty. (Hearing Transcript, pages 4-5).

3. This investigation is being conducted to determine Modes, Inc.'s civil and criminal liability under such laws as 19 U.S.C. § 1592 and 18 U.S.C. § 542. (Hearing Transcript, page 4).

4. On August 9, 1985, two Customs Service summonses were properly issued by Edouard H. Fortier, Customs Special Agent in Charge, demanding documents relevant to the foregoing investigation. The summonses are attached as Exhibits 1 and 2 to the hearing transcript. These summonses were directed to Claude Wilson, attorney for Modes, Inc., and to Modes, Inc. (Hearing Transcript, pages 5-7).

5. The summonses were personally and properly served by Special Agent Robert Wallace on Mr. Wilson himself and on Modes, Inc. through hand-delivery to Jaikishan Budhrani, vice-president of Modes, Inc., on August 16, 1985. Proper third-party notice of the summons served on Mr. Claude Wilson was provided to Modes, Inc. (Hearing Transcript, pages 5-8); Exhibit 3).

6. All administrative steps required by customs laws and regulations for issuance and service of these Customs Service summonses were undertaken. (Hearing Transcript, page 8).

7. On September 5, 1985, the date called for by the summonses for Mr. Wilson and Modes, Inc. to appear before Special Agent Wallace, Claude Wilson and Mr. Budhrani, vice-president of Modes, Inc., appeared at the designated Customs Service office but did not produce

any records. Mr. Wilson refused to produce the records summoned from him on the basis of the attorney-client privilege and Mr. Budhrani, through his counsel Mr. Wilson, invoked the Fifth Amendment privilege. (Hearing Transcript, pages 9-10).

8. The records sought by these summonses are relevant and necessary to the investigation into possible violations of the custom laws by Modes, Inc. (Hearing Transcript, pages 10-12).

9. The Customs Service investigation has not been referred to the Department of Justice for criminal prosecution, and there is no institutional commitment on the part of the Customs Service to proceed criminally with respect to either or both Respondents. (Hearing Transcript, page 12).

10. The documents and the information therefrom demanded by the summonses are not and have not been in the possession of the United States Customs Service with the exception of a few documents relating to one small shipment of goods. These papers are insufficient for the Customs Service to make any determination as to whether there has been compliance with the customs laws by Modes, Inc. (Hearing Transcript, pages 11-12).

11. The documents taken at the Dallas/Fort Worth Airport in May 1985 were not copied, memorized, read, transcribed, retained, or otherwise kept by the United States Customs Service or any other governmental agency. The airport incident in May 1985 has no bearing on the lawfulness of the investigation at hand or on the summonses at issue. (Hearing Transcript, pages 39-40, 43-45, 84).

Additionally, I conclude that, due to Modes, Inc.'s corporate status, no Fifth Amendment privilege attaches to the documents summoned from either Mr. Claude Wilson or from Modes, Inc. With respect to the attorney-client privilege as it applied to the documents summoned from Mr. Wilson, only a blanket privilege has been made to date.

Any future invocation of the attorney-client privilege must be made on a document-by-document basis, specified in sufficient detail for the benefit of Government counsel and the Court, with the proviso that the attorney-client privilege does not apply to any business documents that are summoned here.

It is therefore recommended that the summonses heretofore served upon Respondents Claude Wilson and Modes, Inc. by the Petitioner Robert W. Wallace be obeyed in each and every requirement thereof subject to any proper claim of the attorney-client privilege.

SIGNED this 14th day of January, 1988.

UNITED STATES
MAGISTRATE